

# Beer Business Daily

Daily News & Intelligence Briefings for Global Beer Industry Executives

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Dear Client:

## **NOTED ANTITRUST AND DISTRIBUTION ATTORNEY OFFERS OPINIONS ON 21<sup>ST</sup> AMENDMENT ISSUES**

When *Beer Business Daily* says we will get an expert opinion on current 21<sup>st</sup> Amendment vs Commerce Clause issues, we don't mess around with dumb people. Drew Jaglom holds degrees in Management and Physics from M.I.T. and was graduated magna cum laude from Harvard Law School . He is an antitrust and distribution partner with Tannenbaum Helpern Syracuse & Hirschtritt LLP in New York . Read this excellent brief assessment of the issues at hand:

DREW ON WHETHER COMMERCE TRUMPS 21<sup>ST</sup> AMENDMENT? "I'm afraid it's too simplistic to ask does the 21st Amendment trump the Commerce Clause or vice versa. Yes, if the two are in irreconcilable conflict on a matter of core 21st Amendment concern, it's reasonable to say that the 21st trumps Commerce.

"But most of the courts considering the question have found that's not the case in the direct shipment area, reasoning that there is no temperance virtue in letting local wineries sell direct while forcing the out-of-staters through the three tier system. As the court in the Texas case succinctly put it, ' Texas residents can become as drunk on local wines.'"

DREW ON SUPREME COURT'S VIEW. "The Supreme Court has made it quite clear that it reads the 21st Amendment as less than carte blanche for a state to do whatever it wants as long as there is alcohol is involved, rejecting state regulation that amounts to economic protectionism."

THE 'FATAL CONTEXT': EXEMPTIONS FOR LOCAL PRODUCTS. "So to determine which constitutional provision will hold sway, you need some context. And the fatal context in Swedenburg and most of the other cases striking down state direct shipment laws has been the exemption for local products. Eliminate the local exemption, and it's pretty clear you can prohibit direct shipment to consumers by all producers."

DREW ON TODAY'S HEARING IN NY. "That's what makes Thursday's [today's] hearing interesting -- the playing field in New York can be leveled either by letting out of staters ship direct or by barring the New York wineries from doing so. Judge Berman will have to decide which choice the New York legislature would have made, and however he rules, the legislature is free to tell him he was wrong and legislate the other way, so long as it treats in-state and out-of state wineries

identically." (See BBD 11-14-02 )

DREW ON SUPREME COURT'S MOOD. "Might this Supreme Court decide the 21st Amendment's grant of power to the states is broader than Judge Berman held? It's possible, given this [Supreme] Court's general tilt toward states' rights over federal power, but I expect the Court's free market tendencies to win out and the Commerce Clause to prevail over direct shipment bans that don't apply to local wineries."

DREW ON WHAT IT MEANS TO BEER WHOLESALERS? "In states that allow local breweries to bypass the wholesale tier, whether by direct sales to consumers or to retailers, out of state breweries will end up with the same right unless the legislature decides to restrict the local breweries.

LOCAL BREWER EXEMPTION CAUSES PROBLEMS. "If the local brewery is able to obtain a wholesale license but an out of state brewery is not, the courts are likely to find a Commerce Clause violation, although there is perhaps some room to argue that 21st Amendment concerns justify making licenses available only to in-state firms because of the greater supervision that is possible over local licensees. (Certainly direct shipment to retailers implicates less of a 21st Amendment issue than do direct sales to consumers -- the retailers have been licensed by the state, and any revenue and temperance concerns are thus more readily addressed than if all state licensees are bypassed, as they are when an out of state producer sells directly to a consumer.)

ACTION CHOICES. The choices for wholesalers are basically only two at that point: either persuade the legislature to impose the three tier system on local breweries as well, or persuade their suppliers that the wholesaler adds real value to the marketing and distribution of the suppliers' products and thus justifies a continued role for the wholesaler over direct sales to retailers or consumers by the brewer. If the latter is the route that wholesalers must go, I suspect they will be more successful in some channels and markets than others, as the chains and mass merchandisers press for the economies of direct purchases from brewers.

NO MASS ANARCHY. "The direct shipment cases don't say that states can't regulate alcoholic beverages. They say only that the same rules have to apply to all, in-state producers and out. Anarchy is not around the corner, only a level playing field for all suppliers, regardless of where they produce." Excellent view on what is the most important issue the industry faces going into 2003.



**PITTS BREWING FACING WATER SHORTAGE.** Another regional brewery falls on hard times as the Pittsburgh Brewery had to go to local Judge Robert Gallo to keep their water from being turned off. The water, which is rather important to the brewing of Pittsburgh Brewing's beers, is being kept on through Saturday while Iron City and IC Light brewer and the water and sewer authority attempt to resolve the \$3.7 million water bill that Pitts Brewing may owe the authority. The authority had notified the brewery on Monday that it intended to terminate service Wed., according to the *Pitts Post-Gazette*.

"They made some promises that they haven't lived up to," said Greg Tutsock, executive director of the water and sewer authority to the paper. The last time the brewery made a sewage bill payment to the agency was in December 1998.

DELINQUENT ON NOTE. Pittsburgh Brewing is delinquent on a five-year, \$1.4 million loan it received in 1996 from the Pennsylvania Industrial Development Authority. According to reports, the brewery's problems paying off loans from National City Bank have prompted the bank to take its payments directly from the brewery's cash. The brewery has changed hands several times in the last few years and, unsurprisingly, each owner has found it difficult to turn around the brands.

WHAT ARE THEY WORTH? Declining regional brand with litigation, high debt, and a problem getting water? Count me in. Iron City and IC Light are big players in Penn area but they're no Rolling Rock. The brewery should and likely will be shut down and the brands sold or contracted

brewed somewhere else. Other than a local wealthy hero who wants to get into the beer business, it's a hard sell.

**A-B PUTS UP THE \$\$ FOR ANOTHER YEAR OF SUPER BOWL ADS.** A-B has already bought about 5 minutes worth of airtime for the Super Bowl broadcast on ABC.

Although the brewery is mum on actual costs of ads, experts believe they paid about \$20 million to \$22 million, with 30-second commercials ranging in price from \$2 million to \$2.2 million each, which is about a 15% increase. A-B has been the beer advertiser for the game for about 15 years.

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Until tomorrow, Harry

MTD Sell Day: 4

Sell Days This Month: 21  
Sell Days This Month Last Year: 20  
YTD Over/Under Sell Days: -1

This Month Ends on a: Tue

Last Year This Month Ended on a: Mon

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